No. 85-2099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

On Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENDED

1. Where state law provides indigent prisoners with court-appointed attorneys to aid them in pursuing collateral review of their convictions, does *Anders* v. *California*, 386 U.S. 738 (1967) apply to attorneys who seek leave to withdraw?

2. Since Pennsylvania has chosen to provide indigent prisoners with attorneys to aid them in the formulation, presentation and prosecution of petitions under the Post-Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. section 9541 *et seq.* (Purdon 1982) (hereinafter, PCHA), do the Due Process and Equal Protection clauses of the Fourteenth Amendment require effective counsel who will act as advocates for their clients?

3. Did the procedure utilized in the case at bar, which required court-appointed counsel to brief the case against his client, deny the indigent prisoner meaningful access to the courts, thereby offending traditional notions of Due Process and Equal Protection of the laws?

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COUNTERSTATEMENT OF THE CASE

The Commonwealth of Pennsylvania sought a Writ of Certiorari to this Court after the Pennsylvania Supreme Court, the highest court in the Commonwealth of Pennsylvania, dismissed the Commonwealth's prior appeal as "having been improvidently granted," after full briefing and argument, and reinstated the able and well reasoned order and opinion of the Pennsylvania Superior Court. *Commonwealth* v. *Finley*, 330 Pa. Super. Ct. 313, 479 A.2d 568 (1984), *App. Dismd.*, 507 A.2d 822 (Pa. 1986) (J.A. 18-27).

The Pennsylvania Superior Court held that court-appointed counsel who seeks to withdraw from the representation of an indigent prisoner in a case brought under Pennsylvania's collateral review statute must follow the dictates of *Anders* v. *California*, 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396 (1967), *rehearing denied*, 388 U.S. 924, 18 L.Ed. 2d 1377, 87 S.Ct. 2094. Because Dorothy Finley's court-appointed counsel not only failed to satisfy the requirements of *Anders* v. *California*, *supra*, but actually briefed the case against his client by filing a "no merit" letter to the Court, the Pennsylvania Superior Court concluded that the case had to be remanded to the lower court "for an evidentiary hearing on the claims raised in (respondent's) brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." (J.A. 27). The Superior Court specifically found that the procedure utilized by counsel was "defective," in that it "acted to deprive (respondent) of her right to adequate representation." (J.A. 27).

Dorothy Finley's underlying conviction resulted from a non-jury trial on October 17, 1975, when she was convicted of robbery, criminal conspiracy, weapons offenses,

and second-degree murder.[1] On the murder charge, Dorothy Finley was sentenced to life imprisonment; various sentences were meted out with respect to the other charges and Mrs. Finley, now 54 years old, has been incarcerated at Pennsylvania's State Correctional Institution for Women at Muncy, since 1975.

Mrs. Finley was represented at trial by a court-appointed attorney who also took the direct appeal from her convictions to the Pennsylvania Supreme Court, where all of the sentences and convictions were affirmed in a *per curiam* opinion approximately one page in length

[1] The Commonwealth's brief has a lurid version of the "facts" adduced at trial which respondent disputes. However since a recitation of the facts concerning the crimes charged is not germane to the issue before this Court, respondent will not clutter the record with argument on that score. Suffice it to say that the shooter, identified only as "Red Dude" by the Commonwealth's principle witness Garfield Hedgman, was never arrested or brought to trial. The conviction of Tyrone Finley, who allegedly drove the "get away car" was reversed by The Pennsylvannia Supreme Court at *Commonwealth* v. *Finley*, 477 Pa. 382, 383 A.2d 1259 (1978) for insufficient evidence. His conviction, like that of respondent, depended heavily on the testimony of Hedgman whose admitted presence at the scene was to purchase drugs from the victim, and who pleaded guilty to the victim's robbery and was rewarded with the District Attorney's recommendation that he be sentenced to two years' probation in exchange for his testimony in the two Finley trials. (N.T. 10/15/75, 21-22). The victim's girlfriend, the only other eyewitness, Bernadette Durant, could not identify any of the intruders and testified that she had never seen Dorothy Finley before the trial. (N.T. 10/15/75, 59-62). Interestingly, Hedgman identified the shooter only as "Skeets" at Tyrone Finley's trial, and called the shooter "Fred" in his statement to the police. Despite Hedgman's cooperation with the prosecution, this individual was not apprehended. Mrs. Finley's defense was that she was not present at all at the scene of the crime and she offered testimony of her doctor and pharmacist to substantiate her whereabouts on the afternoon in question.

at *Commonwealth of Pennsylvania* v. *Dorothy Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

According to the Opinion, two issues only had been raised on Mrs. Finley's behalf: (1) there was allegedly insufficient evidence to support any of the convictions for the crimes charged, and (2) a search warrant was based on illegally obtained evidence and therefore, the evidence obtained pursuant to that warrant was inadmissible. After identifying those issues, the Supreme Court concluded: "Having found no merit in either of these arguments, we affirm the judgments of sentence." Thereafter, Mrs. Finley filed a *pro se* petition for relief under the Pennsylvania Post-Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. 9541 *et seq*. (Purdon 1982) (Previously 19 P.S. 1180-1 *et seq*..) (Purdon 1966). Her uncounseled petition merely repeated the allegations raised by her trial counsel in the direct appeal to the Supreme Court. Although Mrs. Finley averred that she was indigent and requested the appointment of a lawyer, the PCHA petition was denied by the Court of Common Pleas in Philadelphia without the appointment of counsel. The Court held: "The allegations raised in the instant petition must be deemed to have been fully litigated." Later, the Pennsylvania Supreme Court reversed that determination, vacated the Order denying relief, and remanded the case to the PCHA court with instructions that counsel be appointed for Mrs. Finley. (J.A. 6) *Commonwealth* v. *Dorothy Finley*, 479 Pa. 332, 440 A.2d 1183 (1981), *reargument denied*.

The Pennsylvania Supreme Court explicitly ruled that: an indigent petitioner had the right to assistance of counsel with her first PCHA petition. (J.A. 7) The ruling rests on both the Post-Conviction Hearing Act and the Pennsylvania Rules of Criminal Procedure. The Pennsylvania

Supreme Court sagely noted that: "Counsel for PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief, and promote efficient administration of justice." (J.A. 8) *Commonwealth* v. *Finley, Id.* at 335.

Thereafter, in compliance with the Order of the Pennsylvania Supreme Court, counsel was appointed for Mrs. Finley on her PCHA petition. However, that court-appointed attorney did not fulfill the role envisioned for him by the Pennsylvania Supreme Court in remanding the case. The attorney did not file an amended PCHA petition; he did not file a brief in support of the issues raised in the uncounseled PCHA petition, or on any other issue. Instead, Mrs. Finley's court-appointed counsel "concluded that no arguably meritorious issues existed" and "sought advice from (the PCHA) court." (J.A. 13)

The PCHA Court thereafter instructed court-appointed counsel that he might withdraw his appearance if he followed the following procedure, ultimately found defective by the Pennsylvania Superior Court:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and has interviewed the defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue the defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincide with counsel's, the Petition would be dismissed without a hearing and defendant would be apprised of her appellate rights. (J.A. 13-14).

PCHA counsel followed the procedure suggested to him by the Court, instead of the procedure outlined in

Anders v. *California, supra,* and wrote a letter to the Court "explaining" why Mrs. Finley's PCHA Petition would be "meritless." (J.A. 9) Not surprisingly, the PCHA Court dismissed petition without a hearing and the attorney was relieved of his appointment.

PCHA counsel never wrote a brief setting forth issues of arguable merit, and, apparently, never notified the indigent criminal defendant of his intentions or of her right to proceed *pro se* or to obtain new counsel. After the Court dismissed the petition without a hearing, undersigned counsel was appointed to pursue an appeal to the Pennsylvania Superior Court.

The Pennsylvania Superior Court concluded that the procedure suggested by the PCHA Court was defective because it had the effect of depriving Mrs. Finley of her right to adequate representation on her PCHA Petition. (J.A. 18-27).

The Pennsylvania Superior Court's Opinion in *Commonwealth* v. *Dorothy Finley,* 330 Pa. Super. 313, 479 A.2d 568 (1984) (J.A. 18-27), first noted that the requirements outlined by this Court in *Anders* v. *California, supra,* are applicable where counsel appointed to represent an indigent defendant in a collateral review proceeding wishes to withdraw from the case on the ground that an appeal would be frivolous. (J.A. 21-22) The Court traced the history of the progeny of *Anders* v. *California* in the Pennsylvania courts, and noted that *Anders* applied to direct appeal cases, and thereafter concluded that it should also apply to an indigent criminal defendant's first petition under the Post-Conviction Hearing Act, a collateral review statute. Key to the Superior Court's reasoning in this case was the prior decision by the Pennsylvania Supreme Court that Dorothy Finley was entitled to

court-appointed counsel on her first PCHA petition. The Superior Court astutely noted: "The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit . . . moreover, Pennsylvania Rule of Criminal Procedure 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (J.A. 24) The Court declined to make its own exhaustive search of the record without benefit of an advocate's review of the record and resulting brief, noting that the Supreme Court had mandated that counsel be appointed to assist Dorothy Finley on her PCHA petition. "This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate." (J.A. 26)

Additonally, the Pennsylvania Superior Court concluded that the procedure followed by PCHA counsel was defective in that counsel's "no merit letter" was insufficient in light of the fact that there appeared to be arguably meritorious issues, and counsel's review of the record was not evident. The Court also noted that PCHA court-appointed counsel had failed to comply with the *Anders* requirement that the indigent herself be informed of counsel's decision, and that she be given the opportunity to proceed *pro se*.

For the above reasons, the Superior Court endorsed the view that counsel seeking to withdraw from a court appointment to represent an indigent criminal defendant on a PCHA petition must comply with the requirements of *Anders* v. *California*, *supra*. The *Anders* requirements were restated by the Court as follows:

> If the attorney, after a conscientious evaluation of the record, finds his case to be 'wholly frivolous,' he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will 'arguably' support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counseled or *pro se*. The *court* after a full examination of the record then decides whether the case is wholly frivolous; and if it so finds, it may grant counsel's request to withdraw. (J.A. 21) (emphasis in original)

The Pennsylvania Superior Court then remanded the case to the Court of Common Pleas of Philadelphia County for an evidentiary hearing on any issues discerned by counsel after "an exhaustive search of the record in accordance with this opinion." (J.A. 27)

Thereafter, the Commonwealth sought review of the Superior Court decision in the Pennsylvania Supreme Court by *allocatur*. *Allocatur* was granted, and the matter was briefed and argued before the Pennsylvania Supreme Court. On April 23, 1986, in a *per curiam* Opinion, the Pennsylvania Supreme Court simply ordered that the Appeal be dismissed "as having been improvidently granted." (J.A. 28). The Commonwealth then sought review of the Superior Court decision by this court. *Certiorari* was granted October 6, 1986.

SUMMARY OF ARGUMENT

Pennsylvania has chosen to provide counsel to indigent prisoners seeking the review of their criminal convictions under Pennsylvania Post-Conviction Hearing Act, *supra*. For that reason, the Pennsylvania Superior Court concluded that the procedure outlined by this Court in *Anders* v. *California*, 386 U.S. 738 (1967), should apply to court-appointed counsel seeking leave to withdraw from cases arising under the Act. Additionally, the Superior Court specifically concluded that the procedure actually

followed in the case at bar not only differed from that prescribed in *Anders*, *supra*, but was itself defective since counsel failed to file a brief referring to any issues of arguable merit in the record; failed to demonstrate an exhaustive reading of the record and failed to inform the client of his intention to withdraw from her case in sufficient time for her to prepare to proceed *pro se* with her PCHA Petition.

Instead, the court-sanctioned "no merit letter" not only deprived Dorothy Finley of her state created right to the effective assistance of counsel for her PCHA Petition but forced her to contend with the grim reality that her own court-appointed lawyer had briefed the case against her.

When a state creates procedures for finally determining guilt or innocence and chooses to provide counsel to persons too poor to retain their own attorneys, the state must insure that the court procedures it uses comport with the demands of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985), *pet. for reh. denied*, citing *Griffin* v. *Illinois*, 351 U.S. 12, 18, 100 L.Ed 891, 76 S.Ct. 505 (1956). The "no merit letter" used in this case required court-appointed counsel to become an adversary to his own client, arguing for the petition's dismissal, and failed to insure that the indigent prisoner's concerns and contentions were brought effectively to the court's attention. Thus, the procedure sanctioned by the Philadelphia Court of Common Pleas failed to satisfy the dictates of Due Process and Equal Protection because it denied Dorothy Finley, an indigent prisoner, meaningful access to the courts to vindicate her state created right to have her conviction reviewed by the court, informed of the issues by an effective advocate acting on her behalf. In the

alternative, it is argued that the states are free to provide their citizens with broader rights than those guaranteed by the United States Constitution. Pennsylvania has freely chosen to adopt the *Anders* three-pronged scheme as a requirement for counsel seeking leave to withdraw from the representation of an indigent prisoner as the most effective solution to a thorny jurisprudential problem. It is not necessary for this court to determine that *Anders* is Constitutionally required to defer to the Pennsylvania Superior Court's decision in this regard. Since Pennsylvania may lawfully require court-appointed attorneys in collateral review cases to adhere to the *Anders* requirements as a matter of state law, this court may well decide that *certiorari* was improvidently granted in this case, and that the case should be remanded to the Philadelphia Court of Common Pleas in accordance with the opinion of the Pennsylvania Superior Court.

ARGUMENT

A. Since Pennsylvania Has Freely Chosen To Provide Counsel To Indigent Prisoners Seeking Collatera! Review Of Their Convictions, Due Process Requires That Attorneys Who Withdraw From Representation Follow The Procedure Outlining In *Anders* v.*California*, 386 U.S. 738 (1967).

The Commonwealth of Pennsylvania provides prisoners with a right to petition the courts for collateral review of their criminal convictions under the Post-Conviction Hearing Act (42 Pa. Cons. Stat. Ann. Section 9541 *et seq*. (Purdon 1982), hereinafter referred to as PCHA). Indigent PCHA Petitioners are entitled to the appointment of counsel for their first PCHA Petition under sec-

tion 9551 of the Act.[2] Counsel is also provided under the Pennsylvania Rule of Criminal Procedure for indigent petitioners.[3] Additionally, the Pennsylvania Courts have interpreted the PCHA (and its predecessor statute now repealed but previously found at Pa. Stat. Ann. Tit. 19 Section 1180-1 *et seq.*) (Purdon 1966) as requiring counsel on a first PCHA Petition. *Commonwealth* v. *McClinton*, 488 Pa. 598, 413 A.2d 386 (1980). The requirement that counsel be appointed to represent the indigent on her first PCHA Petition is applied even where the petition (generally drawn *pro se)* fails to raise new issues, because, "Counsel for a PCHA petitioner can more ably explore legal grounds for a complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." *Commonwealth* v. *Finley*, 497 Pa. 332, 440 A.2d 1183 (1981), reproduced, (J.A. 6-8), because it was an earlier proceeding in the case at bar. See

[2] 42 Pa. Cons. Stat. Ann. Section 9551 (B) Appointment of Counsel: "If the petitioner is without counsel and alleges he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested and the court is of the opinion that a hearing on the Petition is required, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. The appointment of counsel shall not be required if petitioner's claim is patently frivolous and without trace of support in the record as provided by Section 9549 (relating to hearing on petition)."

[3] Pa.R.Crim.P. Section 1503 (A): "Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it." Rule 1504 provides that the appointment of counsel is not necessary "when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he was either afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon."

also *Commonwealth* v. *McClinton*, *supra*, and cases cited therein.[4]

The requirement that counsel be afforded to an indigent PCHA Petitioner does not rest on the Sixth Amendment right to counsel found in the United States Constitution.[5]

[4] *Commonwealth* v. *Blair*, 460 Pa. 31, 331 A.2d 213 (1975); *Commonwealth* v. *Mitchell*, 427 Pa. 395, 235 A.2d 148 (1967); *Commonwealth* v. *Richardson*, 426 Pa. 419, 233, A.2d 183 (1967); *Commonwealth* v. *Hoffman*, 426 Pa. 226, 232, A.2d 623 (1967); and *Commonwealth* v. *Fiero*, 462 Pa. 409, 341, A.2d 448 (1975).

[5] An argument can be made that appointing counsel to represent indigent petitioners seeking collateral review of their criminal convictions is constitutionally compelled under the Sixth and Fourteenth Amendments to the United States Constitution, as the logical development of the law in this area following *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), *Gideon* v. *Wainwright*, 372 U.S. 335, 9L.ed. 2d 799, 83 S.Ct. 792 (1963) and *Douglas* v. *California*, 372, U.S. 353, 9L.ed. 2d 811, 83 S.Ct. 814, *reh. den.* 373 U.S. 905, 10 L.Ed. 2d 200, 83 S.Ct. 1288 (1963). However, it is not necessary to find that the right to counsel is a Constitutional right in order to decide the case at bar. Moreover, *Ross* v. *Moffitt*, 417 U.S. 600, 1 L.Ed. 2d 341, (1974), would not compel the contrary result, since *Ross* v. *Moffitt*, *supra*, held that an indigent prisoner was not entitled to court-appointed counsel for a discretionary appeal to the highest state court, where the issues sought to be brought to the court's attention had previously been the subject of a brief prepared by court-appointed counsel, and the prisoner could supplement that brief with his own contentions in seeking review by the state's highest court. Thus it was felt that the petitioner in *Ross* v. *Moffitt* was not denied meaningful access to the courts because of the assistance available to him from the record, briefs and opinions of the lower court where he was assisted by counsel. *See* discussion of *Ross* v. *Moffitt*, *supra*, in *Evitts* v. *Lucey*, *supra*, 83 L.Ed. 2d at 833. By contrast, a petitioner seeking collateral review of her conviction does not have the benefit of an attorney's review of the record and briefing of the issues that she seeks to raise, because the collateral review process involves issues that have not previously been litigated or argued on the direct appeal. Therefore, *Ross* v. *Moffitt*, *supra*, can be distinguished from the present case.

In *Commonwealth* v. *McClinton, supra,* the Pennsylvania Supreme Court reiterated the reasons for appointing counsel to represent indigent petitioners on their first PCHA applications. Citing a prior opinion of the court, as well as the American Bar Association project on Minimum Standards for Criminal Justice, Standards Relating to Post-conviction Remedies (approved draft 1968), the Pennsylvania Supreme Court pointed out

> We pause to note that the mandatory appointment requirement is a salutary one and best comports with efficient judicial administration and serious consideration of a prisoner's claims. Counsel's ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention. (cites omitted). . . . It is a waste of valuable judicial manpower and an inefficient method of seriously treating the substantive merits of applications for post-conviction relief to proceed without counsel for the applicants who have filed pro se. . . . Exploration of the legal grounds for complaint, investigation of the underlying facts, and more articulate statement of claims are functions of advocate that are inappropriate for a judge or his staff. *Commonwealth* v. *McClinton, supra,* at 600, quoting *Commonwealth* v. *Mitchell, supra* at 148.

Pennsylvania's requirement that counsel be appointed carries with it the requirement that counsel so appointed discharge his duties as a zealous advocate. *Commonwealth* v. *Fiero, supra* at 413, *Commonwealth* v. *Ollie,* 304 Pa. Super. 505, 450 A.2d 1026 (1982). Therefore, where counsel failed to file an amended PCHA Petition (the first having been drawn *pro se*), failed to file a brief, failed to seek an extension of time, and failed to seek a hearing, the Pennsylvania courts have held that the petition was, in actuality, "uncounseled," and that new counsel should be afforded to the petitioner. *Commonwealth* v. *Ollie, Id.* at 510. See also *Commonwealth* v. *Fiero, supra* at 413.

Having determined that a PCHA petitioner is entitled to court-appointed counsel, the Pennsylvania Superior court determined that counsel who seeks to withdraw from such an appointment must comply with the trio of requirements outlined in *Anders* v. *California, supra,* first enunciated in *Commonwealth* v. *Baker,* 429 Pa. 209, 239, A.2d 201 (1968) for cases involving direct appeals in the Commonwealth.

Once a state has determined that counsel should be appointed, there is no logical reason to distinguish between the proper procedures to be followed when counsel seeks to withdraw from representation of an indigent in a direct appeal case, and when counsel seeks to withdraw from representation of an indigent in a PCHA case. If a petitioner has the right to counsel at all, that right must carry with it the right to effective counsel, and following proper procedures that comport with Due Process in order to withdraw is an essential component of that effective representation.

In *Commonwealth* v. *Baker, supra,* the Pennsylvania Supreme Court acknowledged that "even the most diligent court-appointed counsel may sometimes justifiably believe that he is being asked to pursue an appeal totally devoid of merit." *Id.* at 211. The *Baker* Court then restated the *Anders* requirements as follows:

> *Anders* gives to counsel two choices when representing an indigent client on appeal. He may, of course, file briefs and argue the case. But *Anders* emphasizes throughout the court's opinion, that the brief must be that an advocate, not an *amicus curiae*. 386 U.S. at 741, 87 S.Ct. at 1398-99. Or counsel may choose to withdraw his services, in which case this

> procedure must be followed: "If counsel finds his (the client's) case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished to the indigent and time allowed him to raise any points that he chooses. . . ." 386 U.S. at 744, 87 S.Ct. at 1400. *Commonwealth* v. *Baker, Id.* at 211-212.

Moreover, the *Baker* court found that the third requirement of the *Anders* formula, that the client be advised of the attorney's decision to abandon the case, to be "indeed the most important requirement." *Commonwealth* v. *Baker, supra* at 214. "*Anders* clearly demands not only that the indigent be advised of his lawyer's decision to abandon the appeal, but also that the client be given a copy of counsel's brief *in time to present the appeal in propria persona*. Surely, were it not for this last requirement, all the *Anders* requirements would result in mere fodder for the file drawer." (Emphasis in original) *Commonwealth* v. *Baker, supra* at 214.

The procedure followed in the case at bar is woefully deficient when compared with that of *Anders* v. *California, supra*. In writing a "no merit" letter, court-appointed counsel's representation became less "a warm body at the petitioner's side,"[6] which, indeed would not have sufficed, but became, instead, "an assistant to the prosecutor" in seeing that the conviction remained virtually unchallenged. The procedure followed in this case was defective because:

(1) Court-appointed counsel was forced to brief the case against his own client;

[6] See Berger, *The Supreme Court And Defense Counsel: Old Roads, New Paths—A Dead End?* 86 Columbia L.R. 9 (1986).

(2) Court-appointed counsel failed to provide the PCHA petitioner with advance notice of his intentions or a copy of the "no merit" letter that he intended to send to the court; and

(3) The petitioner was not notified of her right to proceed *pro se* or to seek to have other counsel appointed to have her contentions heard.

Additionally, the Superior Court noted that the record is devoid of any attempt by the court-appointed attorney to make an exhaustive review of the record in an attempt to glean issues of arguable merit which could be marshalled to support the petitioner's attack on her conviction. Thus, the Pennsylvania Superior Court declined to review the record without benefit of an advocate's brief, and instead remanded the case for an evidentiary hearing on the claims raised in Dorothy Finley's brief,[7] and "any other

[7] It is not appropriate at this point to speculate on the possible merits of Dorothy Finley's petition, however, in reviewing the record available to the undersigned counsel, the following issues of arguable merit appear and there may certainly be other matters in the record which could, in the hands of a competent and skilled advocate, result in a new trial for the indigent petitioner. For example, there are some questions apparent in the record as to Dorothy Finley's Waiver of a Jury Trial; as to the propriety of Judge Armand Della Porta's refusal to permit certain testimony concerning a package placed in her apartment (which eventually yielded the gun identified as the murder weapon), by a Commonwealth witness never brought to trial (See N.T. 10-15-75, 97-99, 137-141); in the issues raised by trial counsel in his motion to suppress physical evidence (the gun later identified as the murder weapon), since it is not clear that the argument was made that the physical evidence was "the fruit of the poison tree" of an illegal arrest of Dorothy Finley and since this particular motion was hastily made on the day of the trial having been overlooked by counsel at the prior suppression hearing; counsel ineffectiveness at trial; and the possibility that the court's failure to "merge" the convictions relating to criminal conspiracy, robbery and murder was improper.

issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." (J.A. 27) The respondent's present counsel, after some review of the record and discussions with Mrs. Finley, has spotted several issues that are entitled to an evidentiary hearing with their object a request for a new trial for the respondent.

The Commonwealth's Brief has characterized the *Anders* requirements as "confused," and has argued that the extension of *Anders* v. *California* to collateral review proceedings, even where state law provides appointed counsel for indigents, is "impractical, unwise, and constitutionally unnecessary." (Petitioner's Brief pg. 12). On the contrary, however, the *Anders* scheme has the advantage of assuring the indigent prisoner that her concerns will be heard by a court informed by an advocate acting on her behalf. When contrasted with the procedure actually used in the case at bar, *Anders* v. *California* can be seen to provide a workable alternative to what is admittedly a difficult jurisprudential problem, that of court-appointed counsel's inability to advocate effectively a cause he doesn't believe in.

In effect, the "no merit letter" requires court-appointed counsel to file a brief against his own client. "It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when counsel appointed by one arm of the government seems to be helping another to seal his doom."

Additionally, Dorothy Finley herself has requested that the court review the sufficiency of the evidence with a view towards lessening the degree of murder for which she was ultimately convinced, as well as the fact that the victim's wife, one of two eye-witnesses to the crime, failed to identify her as a participant in the crime, and in fact suggested that she was not involved (N.T. 10-15-75 59-62).

Suggs v. *United States*, 391, F.2d 971, 974 (D.C. Cir. 1968). The danger of the "no merit letter" is that the indigent prisoner is in a far worse position than she would have been had her court-appointed counsel simply petitioned to withdraw, because the "no merit letter" requires counsel to marshall the arguments against his client in support of his view that her petition is frivolous, encouraging him to advocate the dismissal of the petition rather than to present an advocate's view of the contentions on her behalf. Moreover, the procedure fails to provide the indigent prisoner with the means or opportunity to present to the court her own *pro se* arguments and instead virtually assures the result that occurred in the instant case, that the PCHA Petition is dismissed.[8]

The need for an advocate to critically review the record, devise arguments, and state them persuasively for the court can not be overstated. Exploration of the legal grounds for a petition, investigation of the necessary underlying facts, and articulating the petitioner's concerns are the functions of an advocate, and are inappropriate for a judge or his staff, in our adversary system.

The concerns that gave birth to *Anders* v. *California*, are as real today, in the collateral review arena, as they were when this Court decided *Anders*. This procedure will assure penniless defendants the same rights and opportunities (where a state provides a collateral review

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[8] Additionally, the "no merit letter" procedure, in conjunction with the Pennsylvania Rules of Criminal Procedure will actually deprive affected petitioners of the chance for a hearing on the merits of any issue identified as frivolous in the letter since the court will doubtless accept counsel's assessment and Rule 1504 provides that counsel need not be appointed on any subsequent petition where an issue has been determined adversely to a petitioner with counsel on a prior petition. See text Footnote 3, supra.

procedure)—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel. *Anders* v. *California*, *supra*, at 145.

The sound jurisprudential reasons for requiring that counsel file an advocate's brief, and that counsel refrain from the "no merit letter" procedure do not change in the collateral review context. Though *Anders* v. *California* arguably depended upon a Sixth Amendment right to counsel, and the case *sub judice* involves a state created right to counsel, once effective, the right to counsel carries with it the right to effective representation, and there is no logical reason for distinguishing between a Sixth Amendment right to counsel which would require *Anders* v. *California* safeguards be applied, and a state created right to counsel for indigent petitioners that is similarly entitled to protection under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Although, for example, there is no Constitutional right to appeal a conviction, this court has repeatedly held that once a state accords such a right, it cannot be withdrawn without consideration of applicable Due Process norms. *Evitts* v. *Lucey*, 469 U.S. 387, 83 L.Ed. 2d 821, 105 S.Ct. 830 (1985). "In short, when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution—and, particularly, in accordance with the Due Process Clause." *Id.* at 833. Thus, in *Evitts* v. *Lucey*, *supra*, the Due Process clause of the Fourteenth Amendment was held to guarantee a criminal defendant the right to the effective assistance of counsel on his (state created) first appeal as of right. These Due Process considerations apply as well to collateral review proceedings.

Lane v. *Brown*, 372 U.S. 477, L.Ed. 2d 892, 83 S.Ct. 768 (1963).

State procedures for collateral review proceedings implicate Equal Protection concerns, too. See *Lane* v. *Brown*, *supra*, and cases cited therein. Equal Protection concerns are involved because the states may not treat one class of defendants—indigent ones—differently for purposes of offering them a *meaningful* review. It is hard to believe, for example, that a retained attorney would file a "no merit" letter or expect to be paid for such an effort. Since an impoverished prisoner must take whatever lawyer the state grants her, and cannot "shop" for a zealous advocate, it is imperative that the court appointed counsel's efforts be scrutinized to insure that the indigent receives the same effective representation—and meaningful access to the courts—that wealthier prisoners receive. To do otherwise would deny poor prisoners the use of available collateral review procedures. In the present case, Equal Protection considerations would proscribe the use of the "no merit letter" by court appointed counsel since that procedure practically guarantees that the indigent prisoner will receive only a cursory review of her allegations concerning the fairness of the trial resulting in her conviction while prisoners able to afford retained counsel can take full advantage of the collateral review proceedings provided by the state to challenge their convictions. While Equal Protection and Due Process considerations are not identical, they frequently "converge" in this Court's analysis of cases involving an indigent prisoner's access to courts and the protection afforded by the criminal justice system. See, for example, *Bearden* v. *Georgia*, 461 U.S. 660, 76, L.Ed. 2d 221, 103 S.Ct. 2064 (1983). This court notes, in *Bearden* v. *Georgia*, *supra*, at 665, and in *Ross* v. *Moffitt*, *supra*, at

608-609 "We generally analyze the fairness of relations between the criminal defendant and the State under the Due Process clause while we approach the question whether the state has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection clause."

Thus, this Court found it fundamentally unfair to revoke the probation of an indigent automatically upon nonpayment of a fine, without a hearing to determine whether the probationer had made all reasonable bona fide efforts to pay the fine, and to consider other sentencing alternatives, in *Bearden* v. *Georgia*, *supra*, finding that the state's automatic revocation of probation offended both the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

In making that ruling, this Court echoed *Griffin* v. *Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), in remarking, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 64. The "*Griffin* principle of equal justice" has been applied in many context to insure indigent prisoners meaningful access to the courts. See cases cited in *Bearden* v. *Georgia*, *supra*, at 664. Moreover, it is clear that the *Griffin* principle also applies to state collateral proceedings. *Lane* v. *Brown*, *supra*. There this Court struck down an Indiana practice requiring that the public defender approve requests for free transcripts for prisoners seeking collateral review of their criminal court convictions. The Court found that the restriction denied indigent defendants the benefits of an existing system of appellate review available to that state for other convicted persons. Similarly, In *Eskridge* v. *Washington State Board of Prison Terms*, 357 U.S. 214, 2 L.Ed. 2d 1269, 78 S.Ct. 1061 (1958), this Court invalidated a provision of

Washington's Criminal Appellate System which conferred upon the trial judge the power to withhold trial transcripts from indigents upon a finding that "justice would not be promoted . . . in that the defendant has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein" *Id.* at 215. This Court reasoned that it was unfair to deny indigents the full appellate review available to any defendant in Washington who could afford the expense of a transcript.[9]

As the above makes clear, it is not a Sixth Amendment right to counsel on collateral review petitions that requires the application of the *Anders* procedure for counsel seeking to withdraw, but rather that the Due Process and Equal Protection clauses of the Fourteenth Amendment mandate fair treatment of indigent prisoners by the courts and the states. Where a collateral review is provided, and where indigent petitioners are accorded the right to counsel, Due Process and Equal Protection require that the assistance of counsel be effective. Since the procedure utilized by withdrawing counsel in the case at bar rendered his assistance not only ineffective, but, actually, a hazard and a hinderance to his indigent client, its use cannot be sanctioned, and the no merit letter procedure should be specifically found a violation of the Fourteenth Amendment's protection to Due Process and Equal Protection of the laws.

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[9] Interestingly, the procedure invalidated in *Eskridge* v. *Washington*, is substantially similar to the procedure the District Attorney urges upon this court in the case at bar, in that the trial judge or, in this case, PCHA judge, would be given the unilateral power and responsibility to determine the merits of an appeal, without benefit of an advocate's review of the record.

In fact, that is essentially the holding of *Anders* v. *California*. This Court specifically noted, "The constitutional requirement of substantial equality and fair process can only be obtained where counsel is an active advocate on behalf of his client, as opposed to that of amicus curiae. The no merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court." *Id.* at 744. It may well be, as the Commonwealth has argued, that the *Anders* procedure is not foolproof. Nonetheless, it is clear that the no merit letter procedure employed in the instant case is not a harmless alternative since it impinges on Due Process guarantees, *Anders* v. *California*, *Id.* at 744. At least the *Anders* procedure avoids the probability that the indigent petitioner's concerns will remain unexamined by the appropriate court, as the Pennsylvania courts recognized in choosing to afford the protection of *Anders* v. *California* to PCHA indigent petitioners whose court-appointed counsel seeks leave to withdraw.

B. Pennsylvania Is Free To Adopt A More Stringent Procedure For Attorneys Seeking Leave To Withdraw From Cases Involving Indigent Prisoners Than What May Be Required By The United States Constitution.

In the alternative argued that the Pennsylvania Superior Court's decision in *Commonwealth* v. *Finley*, rests on adequate and independent state grounds. The states may, of course, offer greater due process and equal protection measures to aid their citizens than what may be required by the United States Constitution. The Post-Conviction Hearing Act is itself state legislation; the requirement that counsel be afforded rests on the PCHA and the Pennsylvania Rules of Criminal Procedure, and the application of *Anders* in this context can be seen as a

simple choice by the Pennsylvania courts to adopt a sound solution for a problem area in the courts.

Note, that the Superior Court itself stated "Pennsylvania law concerning procedure to be followed when a court-appointed attorney see no basis for an appeal *is derived from* the seminal case of *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) *reh. den.* at 388 U.S. 924, 87 S.Ct. 2094." (emphasis supplied) (J.A. 21). It also states. "*Anders* has been applied in similar circumstances and, therefore, we hold that its application to the instant case is proper," without any citation to constitutional or federal requirement for so holding. (J.A. 24) *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983) is therefore satisfied.

If, then, the application of *Anders* to a collateral review proceeding is felt not to be Constitutionally compelled, even where a state has a procedure which affords court-appointed counsel to indigents for collateral review proceedings, then this court may yet decide that Pennsylvania is free, but not required, to choose the *Anders* strategy as an appropriate mechanism for permitting court-appointed counsel to withdraw from an indigent petitioner's case, and, in so doing, this Court will defer to the judgment of the Pennsylvania Superior Court, and dismiss the Commonwealth's appeal to this Court as having been improvidently granted.

In any event, the Commonwealth must not be allowed to assert that an indigent petitioner can be afforded counsel, paid for by the state, who thereafter serves as an assistant prosecutor in briefing the case against his client, in failing to make an exhaustive search of the record to locate and advocate any issues of arguable merit, and in failing to inform the client of his intention to withdraw

from the case in sufficient time for her to proceed *pro se*, or to seek other counsel. Such "assistance" fulfills neither the ethical nor the constitutional obligations of counsel so appointed. Without benefit of an advocate's briefing, an advocate's marshalling of the facts, and an advocate's review of the record, the courts would be hardpressed to accord to the petitioner, be she indigent or not, a fair assessment of her contentions regarding the fairness and propriety of the trial that resulted in her criminal conviction and subsequent imprisonment. The existence of the Pennsylvania Post-Conviction Hearing Act compels the conclusion that Pennsylvania's interest in the fair adjudication of guilt or innocence requires the spirited give and take inherent in a properly functioning adversary system. The application of *Anders* v. *California* to instant case satisfies that standard. The "no merit letter" urged upon you by the District Attorney of Philadelphia does not.

CONCLUSION

Pennsylvania law provides court-appointed attorneys to aid indigent prisoners in the formulation, presentation and prosecution of petitions to review their criminal convictions under Pennsylvania Post-Conviction Hearing Act. The Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, applied to cases involving the rights of indigents in the criminal justice arena, as exemplified by *Griffin* v. *Illinois*, *supra*, and its progeny, require the application of the procedures outlined in *Anders* v. *California*, *supra*, to court-appointed counsel who seek leave to withdraw from the representation of an indigent where a state has chosen to provide legal assistance. Conversely, the same cases proscribe the use of the no merit letter in that situation. The use of the no merit letter affirmatively

denies indigent petitioners their Fourteenth Amendment rights, since it deprives them of the effective assistance of counsel to which they are entitled under Pennsylvania law, and instead forces them to contend with attorneys who openly advocate the Commonwealth's position to their great detriment.

In the alternative, since the Pennsylvania Superior Court decision in this case rests on independent and adequate state grounds, respondent respectfully suggests that certiorari was improvidently granted and should therefore be dismissed.

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